84-98

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FILED
JUL 16 1984
ALEXANDER L. STEVAS,
CLERK

NO._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BENJAMIN ALLEN POPE,
Appellant,

v.

THE STATE OF TEXAS,
Appellee.

On Appeal From The Court of Criminal Appeals of Texas

SUPPLEMENT TO APPENDIX

DOUGAL C. POPE
Attorney for Appellant
2317 Bissonnet
Houston, Texas 77005
(713) 527-9325

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

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APPENDIX A

Motion Denied, and Opinion filed June 9, 1983.

No. B14-82-589-CR

BENJAMIN ALLEN POPE, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from the 177th District Court
of Harris County
Cause No. 359,431

OPINION ON APPELLANT'S MOTION FOR REHEARING

On the day before the opinion in this case was rendered, the Court of Criminal Appeals rendered its opinion in *Martin v. State,* No. 859-82 (Tex. Crim. App. May 11, 1983) (not yet reported). Since such decision overruled its previous line of cases holding an accused waived his right to appellate review of his rights under the Texas Speedy Trial Act by pleading guilty, it now becomes necessary to address the merits of appellant's third ground of error.

Appellant was arrested on February 19, 1982, and charged by complaint with the felony offense of possession of the controlled substances methamphetamine, hydromorphone, and marijuana. He appeared in the 177th Judicial District Court on February 22, 1982 for a probable cause hearing. The following chronology is what occurred thereafter:

Date	*Action*
2-22-82	Agreed setting signed by counsel for state and defense setting matter for examining trial on 2-26.
2-26-82	Agreed setting for presentation to grand jury on 3-5 and arraignment on 3-10.
3-10-82	Agreed setting for arraignment on 3-24.
3-25-82	Agreed setting for arraignment on 4-13.
4-07-82	Appellant indicted in Cause No. 350,662.
4-13-82	Agreed setting for pre-trial hearing on 4-22
4-22-82	Seven pre-trial motions filed, two of which were motions to dismiss on other than speedy trial grounds.
4-22-82	Agreed setting for hearing on motion for 5-25 and trial on 6-28.
6-28-82	Three motions to dismiss filed, one of which was based upon lack of speedy trial.
6-28-82	Agreed trial setting for 7-12.
7-08-82	Appellant reindicted for same transaction under Cause No. 359-431 except that first paragraph alleged possession of cocaine instead of methamphetamine.
7-12-82	Agreed setting for hearing motions on 8-9 and for trial on 8-16.

Date	*Action*
7-14-82	Six more pre-trial motions filed by appellant, including a motion to dismiss on the basis of lack of speedy trial.
7-21-82	A notice of intent to introduce copy of letters if original not produced filed by appellant.
7-23-82	Another motion to dismiss (not on basis of speedy trial) filed by appellant.
7-27-82	Three additional motions filed by appellant.
8-09-82	Hearing on apparently all motions including his motion to dismiss for failure to provide a speedy trial.
8-16-82	Motion to dismiss indictment (not on basis of speedy trial) filed by appellant.
8-16-82	Plea of *nolo contendere* entered by appellant and punishment assessed in accordance with plea negotiations.

At the hearing on appellant's speedy trial motions on August 9, 1982, he proved through the clerk's records that neither an oral nor written notice of ready for trial had been filed by the prosecutor in the re-indicted Cause Number 359,431 and rested. The prosecutor put on no evidence, but when asked by the court if he wished to be heard, he responded the court should take judicial notice of all the agreed settings of the case and stated the "state has been ready for trial within the 120 days as provided by Speedy Trial Act." Based upon the record before us, we are unimpressed with appellant's argument that we

cannot accept the unsworn statement of the prosecutor that the state had been ready for trial within the 120-day limit of the Act. No motions were filed on behalf of the state and the first trial setting for June 28, 1982 was made on April 22, 1982, some 62 days after appellant was arrested, well within the 120-day limit. Even if the trial had been conducted on June 28th and that date was outside the 120-day limit, this would not benefit appellant since the requirement of the Act applies to prosecutorial preparedness and does not encompass the trial court and its docket. *Barfield v. State*, 586 S.W.2d 538 (Tex. Crim. App. 1979). When the prosecutor declared the state had been ready for trial within the 120-day time limit and appellant elicited no evidence in rebuttal thereof, the requirements of the Speedy Trial Act were fulfilled. *Id.* Appellant's third ground of error is overruled.

The reasoning of the Court of Criminal Appeals in *Martin* that by pleading guilty the accused does not waive the right to appellate review of a speedy trial claim under the Texas Speedy Trial Act, has no application to the waiver of an accused's constitutional right to a speedy trial because *Martin* construes the wording of the Texas statute. We remain convinced of the soundness of our original opinion disposing of appellant's fourth ground of error asserting denial of a speedy trial under the constitution.

The motion for rehearing is overruled.

/s/ Sam Robertson
Associate Justice

Judgment Rendered, and Opinion filed June 9, 1983.

Panel consists of Associate Justices Pressler, Robertson and Cannon.

APPENDIX B

COURT OF APPEALS
Fourteenth Supreme Judicial District of Texas
Harris County Civil Courts Building
Houston, Texas 77002

June 30, 1983

Hon. Dougal C. Pope
Pope & Waits
2317 Bissonnet
Houston TX 77005

Richard Mason
Assistant District Attorney, Harris Co.
201 Fannin
Houston TX 77002

RE: CASE NO. 14-82-00589-CR
TRIAL COURT CASE NO. 359,431

STYLE: Pope, Benjamin Allen
v: The State of Texas

Please be advised that, on this date, the Court OVERRULED appellant's second motion for rehearing in the above cause.

Respectfully yours,

MARY JANE SMART, Clerk

By: /s/ REBECCA McMAHON
Deputy

APPENDIX C

Motion Denied, and Opinion filed August 11, 1983; Opinion on Motion for Rehearing of June 9, 1983 is withdrawn.

NO. B14-82-589CR

BENJAMIN ALLEN POPE, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from the 177th District Court
of Harris County, Texas
Cause No. 359,431

OPINION ON APPELLANT'S SECOND MOTION FOR REHEARING

Our prior opinion in which we wrote on appellant's first motion for rehearing is withdrawn and the following is substituted therefor.

On the day before our original opinion in this case was issued, the Court of Criminal Appeals handed down its opinion in *Martin v. State,* No. 859-82 (Tex. Crim. App. May 11, 1983) (not yet reported). Since such decision overruled its previous line of cases holding an accused waived his right to appellate review of his rights under the Texas Speedy Trial Act by pleading guilty, it now becomes necessary to address the merits of appellant's third ground of error.

Appellant was arrested on February 19, 1982, and charged by complaint with the felony offense of possession

of the controlled substances methamphetamine, hydromorphone, and marijuana. He appeared in the 177th Judicial District Court on February 22, 1982 for a probable cause hearing. The following chronology is what occurred thereafter:

Date	*Action*
02-22-82	Agreed setting signed by counsel for state and defense setting matter for examining trial on 2-26.
02-26-82	Agreed setting for presentation to grand jury on 3-5 and arraignment on 3-10.
03-10-82	Agreed setting for arraignment on 3-24.
03-25-82	Agreed setting for arraignment on 4-13.
04-07-82	Appellant indicted in Cause No. 350,662.
04-13-82	Agreed setting for pre-trial hearing on 4-22.
04-22-82	Seven pre-trial motions filed, two of which were motions to dismiss on grounds other than lack of speedy trial.
04-22-82	Agreed setting for hearing on motion for 5-25 and trial on 6-28.
06-28-82	Three motions to dismiss filed, one of which was based upon lack of a speedy trial.
06-28-82	Agreed trial setting for 7-12.

Date	*Action*
07-08-82	Appellant reindicted for same transaction under Cause No. 359,431, except that first paragraph alleged possession of cocaine instead of methamphetamine.
07-12-82	Agreed setting for hearing motions on 8-9 and for trial on 8-16.
07-14-82	Six more pre-trial motions filed by appellant, including a motion to dismiss on the basis of lack of a speedy trial.
07-21-82	A notice of intent to introduce copy of letters if original not produced filed by appellant.
07-23-82	Another motion to dismiss (not on basis of speedy trial) filed by appellant.
07-27-82	Three additional motions filed by appellant.
08-09-82	Hearing on apparently all motions including his motion to dismiss for failure to provide a speedy trial.
08-16-82	Motion to dismiss indictment (not on basis of speedy trial) filed by appellant.
08-16-82	Plea of *nolo contendere* entered by appellant and punishment assessed in accordance with plea negotiations.

At the hearing on appellant's speedy trial motion on August 9, 1982, he proved through the clerk's records that neither an oral nor written notice of ready for trial had been filed by the prosecutor in the re-indicted Cause

No. 359,431 and rested. The prosecutor put on no evidence, but when asked by the trial court if he wished to be heard, he responded the court should take judicial notice of all the agreed settings of the case and stated, the "state has been ready for trial within the 120 days as provided by Speedy Trial Act." Based upon the record before us, we are unimpressed with appellant's argument that we cannot accept the unsworn statement of the prosecutor that the state had been ready for trial within the 120-day limit of the Act. No motions were filed on behalf of the state and the first trial setting for June 28, 1982 was made on April 22, 1982, some 62 days after appellant was arrested, well within the 120-day limit. Even if the trial had been conducted on June 28th and that date was outside the 120-day limit, this would not benefit appellant since the requirement of the Act applies to prosecutorial preparedness and does not encompass the trial court and its docket. *Barfield v. State,* 586 S.W. 2d 538 (Tex. Crim. App. 1979). When the prosecutor declared the state had been ready for trial within the 120-day time limit and appellant elicited no evidence in rebuttal thereof, the requirements of the Speedy Trial Act were fulfilled. *Id.* Appellant's third ground of error is overruled.

Appellant contends we were in error in holding that by entering a plea of *nolo contendere* he waived his claim of a denial of a constitutional right to a speedy trial. We agree, as the Court of Criminal Appeals has held otherise. *Riggall v. State,* 590 S.W.2d 460 (Tex. Crim. App. 1979). We will address the merits of appellant's fourth ground of error dealing with his constitutional claim of denial of a speedy trial and apply the balancing test of *Barker v. Wingo,* 407 U.S. 514 (1972). The four factors

to be weighed in determining whether an accused has been denied his right to a speedy trial are: (1) length of delay, (2) reason for the delay, (3) defendant's assertion of his right, and (4) prejudice to the defendant. *Id.* According to the teaching of *Barker*, the four factors are to be considered together and each case is to be judged on an ad hoc basis.

Looking to the facts of this case, appellant was brought to trial in under six months from the date of the offense. The record does not show the reason for the delay, but from the above chronological history of the case we find the case was active on the court's docket at all times. As to appellant's assertion of the right to a speedy trial, we find he *never* requested a speedy trial but only objected to the lack thereof on June 28, 1982, when the 120-day limit provided by the Speedy Trial Act had expired. Appellant *attempts* to show he was prejudiced by the delay by the following novel reasoning. At the hearing on his motion to dismiss for failure to provide a speedy trial, appellant called the court clerk as a witness and proved the indictment under which the proceedings were had was returned July 8, 1982; it alleged the offense to have occurred on February 19, 1982, which was more than 120 days; and appellant had been continuously in custody since commission of the offense. On cross-examination by the prosecutor, the following occurred:

> Q. Do you have present with you Cause No. 350662, the old reindictment [sic]?
>
> A. [Clerk] Yes.
>
> Q. For the record, you have not been able to locate the docket sheet in Cause No. 350662; is that correct?

A. That is correct.

Q. Also for the record, 359431 is a reindictment of 350662; is that correct?

A. Yes, sir.

MR. MAGIDSON (The prosecutor):
At this time we offer into evidence official records of 350662; more specifically, for the court's attention, all of the agreed reset forms in this case and also the docket sheets, also that. That is all we have.

When the court reporter filed her transcript of the proceedings on September 20, 1982, she included the "reset" forms as an exhibit. Appellant's counsel then presented a motion for a supplemental statement of facts to the trial court, stating that "the state introduced in evidence the entire file in Cause No. 350662," that the court reporter had not included "the entire file in Cause No. 350662 in the Statement of Facts," and that he desired it be included in a supplemental statement of facts. On October 18, 1982, the trial court granted the motion and, consequently, there has been transmitted to this court four large manila envelopes of xeroxed copies of material that has nothing to do with this appeal. However, included with this material is a copy of appellant's "Motion to Set Aside the Indictment Because the State has not Complied with Article 32A.02 of the Texas Code of Criminal Procedure" which was filed on June 28, 1982. This motion, signed only by appellant's attorney and not sworn to by anyone, alleges that the "long delay in bringing [appellant] to trial has caused him to lose the benefit of the testimony of substantially all of his witnesses" since they have now moved and he can not find them. The motion further alleges that "most of those seven

witnesses" would testify to facts which would show appellant was not in possession of the drugs on the occasion in question.

With this factual background, appellant argues, "[W]hen the state introduced the Defendant's Motion to Set Aside the Indictment Because the State has not Complied with Article 32A.02 of the Texas Code of Criminal Procedure in Cause No. 350,662, the first case, the state admitted every fact, statement, and conclusion in that motion, and the contents of that motion are conclusive against the state." We do not agree with appellant's contention that the prosecutor introduced appellant's motion into evidence because the record simply belies this. As we construe that portion of the record quoted above, the prosecutor introduced the agreed reset forms and the docket sheet and appellant's counsel has attempted to expand the prosecutor's offer to include evidence not offered. Because of our holding that the prosecutor did not introduce into evidence the motion to dismiss, we therefore do not address appellant's contention that the state was bound by the assertion made by appellant's counsel in the motion. We hold (1) the length of delay was not unreasonable; (2) in the absence of any showing to the contrary, the reason for the delay is of little consequence because the case was shown to be active at all times on the trial court's docket; (3) appellant failed to show that he ever asserted his right to a speedy trial but, to the contrary, agreed to the continuances causing the delay; and (4) appellant failed to show he was in anyway prejudiced by the delay. Accordingly, we overrule his fourth ground of error asserting a denial of a speedy trial under the Constitution.

The motion for rehearing is overruled.

/s/ Sam Robertson
Associate Justice

Judgment Rendered, and Opinion filed August 11, 1983.
Panel consists of Associate Justices Pressler, Robertson and Cannon. Justice Cannon not participating.

COURT OF APPEALS
14th Supreme Judicial District
Civil Courts Building
Houston, Texas 77002

August 11, 1983

Hon. Dougal C. Pope
Pope & Waits
2317 Bissonnet
Houston TX 77005

Richard Mason
Assistant District Attorney, Harris Co.
201 Fannin
Houston TX 77002

RE: CASE NO. 14-82-00589-CR
TRIAL COURT CASE NO. 359,431

STYLE: Pope, Benjamin Allen
v. The State of Texas

Gentlemen:

Please be advised that, on this date, the Court OVERRULED appellant's motion for rehearing in the above cause; an Court's opinion was delivered.

Respectfully yours,

MARY JANE SMART, Clerk

By: /s/ REBECCA McMAHON
Deputy

APPENDIX D

COURT OF CRIMINAL APPEALS
OF TEXAS

NUMBER 0887-83

IN THE 14th COURT OF APPEALS

COURT OF APPEALS NO. 14-82-589

POPE, BENJAMIN ALLEN

v.

THE STATE OF TEXAS

O R D E R

The Appellant's petition for discretionary review in the above numbered and entitled cause is refused.

PER CURIAM

Delivered February 8, 1984.

APPENDIX E

OFFICIAL NOTICE

COURT OF CRIMINAL APPEALS

STYLE: Benjamin Allen Pope
COURT OF CRIMINAL APPEALS NO. 887-83

April 25, 1984

On this day, the Appellant's Motion for Rehearing was denied.

THOMAS LOWE, Clerk

COURT OF CRIMINAL APPEALS
P. O. Box 12308, Capital Station
AUSTIN, TEXAS 78711

MAIL TO: Mr. Dougal C. Pope
Attorney at law
2317 Bissonnet
Houston, Texas 77005

CERTIFICATE OF SERVICE

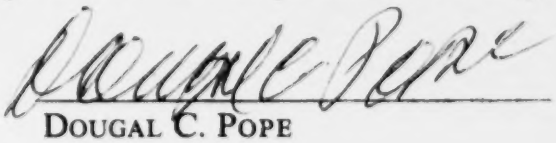
Three copies of the foregoing were served on all parties required to be served and they were mailed to each of the following on the 30th day of July, 1984, by certified mail, return receipt requested, with sufficient postage affixed to the particular envelopes:

Mr. Richard Mason
Assistant District Attorney
201 Fannin
Houston, Texas 77002

State Prosecuting Attorney
P. O. Box 12405
Austin, Texas 78711

Mr. Jim Mattox
Attorney General of Texas
P. O. Box 12548
Capital Station
Austin, Texas 78711

Additionally, three copies of the Jurisdictional Statement were served of Jim Mattox, Attorney General of Texas, at the address listed above on the 30th day of July, 1984, by certified mail, return receipt requested, with sufficient postage affixed to the particular envelop.



DOUGAL C. POPE